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THE UNIFORM PROBATE CODE:
THE WAY TO PROBATE IN NORTH DAKOTA

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AND

GARY R. THUNE**

INTRODUCTION

So I believe and conclude it best for you to follow me, and I will be your guide, and from here will take you to the everlasting place, where you will hear shrieks of desperation where you will see the famous spirits in such pain that each one calls for a second death. (Virgil)

—Dante, *Inferno*
Canto 1, Lines 112-117

Most lawyers and judges have become familiar, perhaps even comfortable, in the use of probate codes presently in effect in their states. Probate jurisdiction as we practice it has its roots deep in English legal history.¹ Our statute of wills² echoes its precursor of 1837,³ as to its manner of execution.

The basic premise of the existing probate system is that the court assumes the responsibility for the proper administration of all incidents of the estate brought under its active jurisdiction. The proper exercise of this responsibility requires direct supervision of the many details of estate and guardianship administration, most of which are unlikely to give rise to any controversy. The active role of the court in all the steps of administration tends to encourage

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1. *MAGNA CHARTA* §§ 26, 27 (1215); *see also* SCHOULER, *WILLS* 14 (5th ed. 1915), 2 *KENT, COMMENTARIES* 502; 2 *BLACKSTONE, COMMENTARIES* 491.

2. *N.D. CENT. CODE* § 56-03-02 (1960); Source: *DAKOTA CIVIL CODE* § 691, 693 (1877).

3. 1 *VICT. ch. 26* (1837); *compare* Section IX with *N.D. CENT. CODE* §§ 56-03-01, 02, as to manner of execution and attestation.

4. *N.D. CENT. CODE ch. 30-17* (Supp. 1973).

passivity on the part of the respondent beneficiaries. This passivity was acceptable in the stable, rural societies where American probate practice was developed. However, today the active participation of the heirs is needed to best protect their private interests in the prompt nurture and administration of probate estates. In any inflationary economy unnecessary delays in transmittal of control over property interests to the rightful beneficiaries necessarily denies re-investment opportunities to those beneficiaries. There can be no good reason why willing respondents should not be allowed to assume some of the risks of personal liability in exchange for a more expeditious settlement of the estate of their ancestor in title.

The present system, with some exceptions for summary administration of small estates,⁴ permits only a fully supervised administration. The Uniform Probate Code (UPC) preserves the full supervision of an estate as an optional procedure, but allows the personal representative and the respondents a wide range of alternative responses to the requirements of devolution of estate assets to persons entitled thereto.

It is the purpose of this paper to outline some of the alternatives available under the UPC, as they might occur in the administration of a typical estate. With the exception of jurisdiction, other matters pertaining to the UPC treatment of non-probate transfers (guardianships, trusts, and other related matters) have been omitted here, but must be considered elsewhere⁵ for an understanding of the full scope of the UPC. The definitive jurisdictional provisions of the North Dakota enactment of the UPC (hereinafter cited as the NDUPC)⁶ vest jurisdiction of the subject matter of probate and guardianship in the county court of each county.⁷ The continuing jurisdiction of the district court as the initial appellate tribunal in probate matters is preserved, as is its jurisdiction in the administration of trusts.⁸ However, the NDUPC's attribution of a trustee's powers and responsibilities to a guardian or conservator⁹ appears to have resulted in an unintentional and impermissible misapplication of the respective powers of the county court and the

5. See e.g., ACLEA, UNIFORM PROBATE CODE PRACTICE MANUAL (1972); W. Davis, *The New North Dakota Probate Code*, 49 N.D. L. REV. 563 (1973); Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636 (1970); R. Stroup II, *Probate Practice Under the Uniform Probate Code*, 46 N.D. L. REV. 289 (1970).

6. Except where otherwise noted, all citations to the North Dakota Uniform Probate Code [N.D. CENT. CODE, tit. 30.1 (effective July 1, 1975)] will refer to Sections 30.1-01-01 through 30.1-35-01, as published in Chapter 257 of the 1973 North Dakota Session Laws. They will be accompanied by a citation to the parallel section of the Uniform Probate Code (U.P.C.). These NDUPC sections do not appear in the 1973 Supplement of the NORTH DAKOTA CENTURY CODE due to their delayed effective date as provided by N.D. CENT. CODE § 30.1-35-01 (effective July 1, 1975); U.P.C. § 8-101.

7. N.D. CENT. CODE § 30.1-02-02 (effective July 1, 1975), U.P.C. § 1-302.

8. *Id.*

9. N.D. CENT. CODE § 30.1-18-09 (effective July 1, 1975), U.P.C. § 8-709.

10. N.D. CENT. CODE §§ 30.1-26-02, 30.1-29-01 (effective July 1, 1975), U.P.C. §§ 5-102, 5-401.

district court, in at least two instances.¹⁰ It is submitted that both protective proceedings and guardianship proceedings are within the exclusive original jurisdiction of the county court of the respective county where territorial jurisdiction has attached.

The sole jurisdiction of the district court in trust matters is recognized in Section 30.1-33-01 (7-201) of the NDUPC. It is submitted that the governing legislative intent in adapting the UPC to the North Dakota judicial system was to preserve unchanged the jurisdictional distinctions between the exclusive original probate and guardianship jurisdiction of the county court on the one hand and the exclusive original jurisdiction of the district court over trust matters on the other. It is anticipated that conforming amendments to the NDUPC as passed will be introduced during the 1975 session of the Legislative Assembly.¹¹

An attempt will be made to correlate the existing Title 30 provisions with the corresponding provisions of the North Dakota Uniform Probate Code.¹² It is hoped that this approach will help catalogue the similarities of the UPC procedures to existing law. Our further aim is to isolate and identify those UPC provisions and concepts that are new and different. Resort to existing North Dakota Lawyer's Desk Manual practice aids¹³ and Uniform Probate Code Practice Manual¹⁴ texts is strongly urged to supplement this necessarily limited discussion.

The various stages of probate administration have been classified for your consideration, under the following headings:

- I. Original Petition and Notice
- II. Qualification of Personal Representative
- III. Inventory and Appraisalment
- IV. Duties and Powers of Personal Representative
- V. Creditors' Claims
- VI. Estate Tax Returns
- VII. Bringing the Estate to a Close
- VIII. Final Distribution and Discharge

The time for preface is past. Let us now proceed to the comparison.

11. Minutes of July 12, 1973 meeting of the Judiciary "A" Interim Committee of the North Dakota Legislature.

12. A table of existing probate code sections and the respective NDUPC sections which appear to parallel them is found at Appendix A, *infra*.

13. STATE BAR ASSOCIATION OF NORTH DAKOTA, LAWYER'S DESK MANUAL, *Probate Checklists* (1965, 1970).

14. ACLEA, *supra* note 5; see also ARIZONA PROBATE CODE PRACTICE MANUAL (1973).

15. N.D. CENT. CODE § 30-02-01 (1960).

I. ORIGINAL PETITION AND NOTICE

. . . The suffering of the people down below gives my face the color of pity which you mistake for fear. Let us go for the long road urges us on. (Virgil)

—Dante, *Inferno*
Canto 4, Lines 19-22

A. JURISDICTION

Present statutes call for the filing of a petition in an appropriate court,¹⁵ alleging the jurisdictional facts.¹⁶ Proper filing vests that court with jurisdiction over the subject matter of the estate of the particular decedent.¹⁷ Jurisdiction over the persons of the respondent heirs, devisees, and legatees, or other interested persons is thereafter obtained by the issuance and service of a notice of hearing on the original petition.¹⁸

Under the NDUPC, jurisdiction is discussed in Chapter 02 (1-301 et seq.) and Chapter 13 (3-201 et seq.). The latter chapter also establishes priorities among persons entitled to appointment as personal representative.¹⁹ The original jurisdiction of the County Court is covered in Section 30.1-12-06 (3-106).

The "general definitions" section of Chapter 30-01 of the North Dakota Century Code is echoed in NDUPC Section 30.1-01-06 (1-201). "The Court" as defined therein is the County Court of each county whether or not such court is one exercising increased jurisdiction.²⁰ County courts with increased jurisdiction in North Dakota are county courts which have been vested with additional powers in criminal and civil matters other than probate. All county courts within the state are on equal footing with each other as to their authority in probate and guardianship matters.²¹

The NDUPC requirement that an heir survive the decedent by one hundred twenty hours (not five days, but 120 hours)²² is important, because unless he survives for that period of time a person who would otherwise have been an heir at law of the subject decedent is deemed to have predeceased that decedent.²³ This would bear on the question of which of two possible estates should be probated in circumstances where related parties died within 120 hours of each other.

B. INFORMATION REQUIRED FOR PETITION

Counsel for a decedent's estate under the UPC has the same

16. N.D. CENT. CODE §§ 27-07-06, 88 (1960).

17. *Id.*

18. N.D. CENT. CODE § 30-02-06 (1960).

19. See Qualification of Personal Representative, *infra* at 14.

20. N.D. CENT. CODE § 30.1-01-06(6) (effective July 1, 1975), U.P.C. § 1-201(e).

21. N.D. CONST. § 111 (1889).

22. N.D. CENT. CODE § 30.1-04-04 (effective July 1, 1975), U.P.C. § 2-104.

23. *Id.*

responsibility to collect and interpret the facts concerning that estate as he has under the present system. Consequently existing information checklists²⁴ will continue to be useful. It is arguable that with the informal procedures which will become available under the NDUPC,²⁵ accuracy and completeness of the estate facts collected by the counsel may be even more important than at present. An unintentionally omitted respondent is more likely to demand full service of notice²⁶ than is a respondent who has been consulted prior to the commencement of probate administration.

C. FORM AND SUFFICIENCY

Probate administration under the NDUPC may be commenced by filing with the court a petition for either an informal probate²⁷ or formal probate.²⁸ The essential allegations of either informal or formal probate petitions are substantially similar to the requirements of the Petition for Letters of Administration²⁹ in intestate estates, or for Letters Testamentary³⁰ where the decedent left a will.

Quaere: May existing stocks of forms be used after July 1, 1975, when the code becomes effective? It is the writers' opinion that existing petition forms and other forms that do not directly conflict with operative provisions of the NDUPC may be used. A note of caution should be followed in the use of old forms. Counsel should be sure to include the minimum allegations necessary to satisfy the new requirements, while typing away on the inclusion of allegations that are no longer required.³¹ The extra work will be a comfort to lovers of form and may be treated as mere surplusage by all concerned. It is recommended that the forms committee studies that have been undertaken by the State Bar Association in the past be revived and pursued vigorously. It is strongly urged that simplified probate forms be developed promptly and adopted by appropriate authority for statewide use. The Uniform Probate Code Practice Manual contains examples of forms which could readily be adapted to our use.³²

24. STATE BAR ASSOCIATION OF NORTH DAKOTA, LAWYER'S DESK MANUAL, *Probate Checklists* (1965, 1970).

25. N.D. CENT. CODE § 30.1-14-01 (effective July 1, 1975), U.P.C. § 3-301.

26. N.D. CENT. CODE § 30.1-13-04 (effective July 1, 1975), U.P.C. §§ 3-204.

27. N.D. CENT. CODE § 30.1-14-01 (effective July 1, 1975), U.P.C. § 3-301. It should be noted that the UPC refers to this paper as an "application," rather than a petition, when the proceedings are informal.

28. N.D. CENT. CODE § 30.1-15-01 (effective July 1, 1975), U.P.C. § 3-401.

29. N.D. CENT. CODE §§ 30-02-03, 30-08-04 (1960).

30. N.D. CENT. CODE §§ 30-02-03, 30-05-07 (1960).

31. Compare *e.g.*, N.D. CENT. CODE § 27-07-06 (1960) with N.D. CENT. CODE § 30.1-13-01 (effective July 1, 1975), U.P.C. § 3-201; N.D. CENT. CODE § 30-02-03 with N.D. CENT. CODE § 30.1-15-02 (effective July 1, 1975), U.P.C. § 3-402.

32. ACLEA, *supra* note 5 at 275-477; *see also* ARIZONA PROBATE CODE PRACTICE MANUAL (1973).

It is recommended that single-sided and unruled forms be adopted in this State. The language should be plain or statutory English.³³ There should be spaces reserved at the top of each form for insertion of counsel's identity and the Clerk's filing and recording data. Any form from which certified copies are customarily supplied should have the certificate form printed on its face. No information should be required or allowed to be placed on the back of the form. Even those counties still using a fold-up envelope filing system can comply with this last mentioned requirement by folding the documents for filing with their top-face on the outside. Examples of this type of recommended form are included in the appendices.³⁴ These recommendations will not be considered radical when it is understood similar, simplified forms have long been in use elsewhere.³⁵

Although it appears that an election by any interested party for a fully supervised probate is irreversible to informal probate thereafter,³⁶ it is anticipated that early practice under the NDUPC will tend toward the use of fully supervised probate procedures.³⁷ Those procedures will substantially continue present probate practices and will have the advantage of being more familiar to the bar and the public than the new informal procedure. Conversely, as experience under the NDUPC grows, so should the use of informal probate procedure increase. Fully supervised formal probate administration will continue to be available to all who desire court involvement in each step of probate administration. A testator may also restrict the use of informal procedures in the administration of his estate by directions in his will. On the other hand, informal procedures may be utilized in many stages of probate administration. It is essential that attorneys recognize that the formal and informal procedures are not mutually exclusive. Formal procedures can be integrated at any stage of an informal administration where they are desired or requested by an interested person.³⁸ Further proceedings would return to the informal mode unless a request for formal procedure or fully supervised administration was filed. Under this flexible system for administering decedent's estates the alternative choices available make it possible to tailor the methods of the NDUPC to the specific facts and needs of each individual

33. Any similarity between the two is presumptively coincidental.

34. Appendix B, *infra* at 48.

35. *E.g.*, California probate forms.

36. N.D. CENT. CODE §§ 30.1-16-05, 30.1-21-01 (effective July 1, 1975), U.P.C. §§ 3-505, 3-1001.

37. N.D. CENT. CODE § 30.1-16-01 *et seq.* (effective July 1, 1975), U.P.C. § 3-501 *et seq.*

38. *See* Wellman, *Methods of Probate*, ACLEA UNIFORM PROBATE CODE PRACTICE MANUAL at ch. 6 (1972).

estate.³⁹ It must be recognized that some risks are necessary by-products of some informal procedures.⁴⁰

D. NOTICE

Jurisdiction over respondents is to be obtained by service of a Notice of Hearing,⁴¹ generally requiring 14 days notice if made personally at a respondent's dwelling, business place or by mail. It also provides for published notice once a week for three consecutive weeks, with the last publication at least ten days before the time set for the hearing.⁴²

On informal probate, the only notice required is to those who have requested it by filing with the court a demand for notice of hearing on such petition.⁴³ Notice of hearing on formal probate has additional requirements⁴⁴ which are substantially the same as provided by the present code⁴⁵ and requires notice to any additional person who has filed a demand for notice.

II. QUALIFICATION OF PERSONAL REPRESENTATIVE

Preference for appointment as personal representative and for filing of petition therefore under NDUPC Section 30.1-13-03 (3-203), substantially retains the categories of existing law.⁴⁶ Appointment of the personal representative in testate estates is either of the person named as executor by the will⁴⁷ or is governed by the priorities for appointment of administrators of intestate estates.⁴⁸

The feature of existing law which restricts the classes of persons who may file a petition for appointment as personal representative⁴⁹ (other than an executor named in a will) has not been included in the NDUPC. The filing of a petition for appointment of a personal representative in informal probate or formal probate proceedings, respectively, is authorized by Sections 30.1-12-05 (3-105) and 30.1-15-01 (3-401) of the NDUPC. However, a will may be proved without the necessity of applying for the appointment of an executor or administrator.⁵⁰

To qualify as a personal representative requires the filing in

39. See Working Draft Number 5 of the Uniform Probate Code with Prefatory Note and Comments 1-37 for illustrations of the various methods, and the risks entailed, as the options are applied to a fact situation.

40. See ACLEA, UNIFORM PROBATE CODE PRACTICE MANUAL 76-77 (1972) and note 39, *supra*.

41. N.D. CENT. CODE § 30.1-03-01 (effective July 1, 1975), U.P.C. § 1-401.

42. *Id.*

43. N.D. CENT. CODE § 30.1-13-04 (effective July 1, 1975), U.P.C. § 3-204.

44. N.D. CENT. CODE § 30.1-15-03 (effective July 1, 1975), U.P.C. § 3-403.

45. See N.D. CENT. CODE §§ 30-05-08, 30-08-04 (1960) as to testate and intestate estates, respectively.

46. N.D. CENT. CODE §§ 30-08-02, 03, 08 (1960).

47. N.D. CENT. CODE § 30-07-01 (1960).

48. N.D. CENT. CODE §§ 30-08-02, 03, 08 (1960).

49. N.D. CENT. CODE § 30-08-03 (1960).

50. N.D. CENT. CODE § 30.1-15-01 (effective July 1, 1975), U.P.C. § 3-401.

the court of "any required bond and a statement of acceptance of the duties of the office."⁵¹ The customary requirement of a performance bond of the personal representative (unless excused by the testator in his will,⁵² or by all the respondents in cases of intestacy),⁵³ has not been followed by the NDUPC.⁵⁴

The emphasis has been changed to assume that no bond will be required unless one is requested by interested persons, or unless the court deems it advisable to require a bond.⁵⁵ This shift in emphasis has evoked consternation on the part of the Veterans Administration and at least one of the corporate bonding companies which does business in this State. Representatives of both institutions have appeared before the Judiciary "A" Interim Committee of the North Dakota Legislative Council concerning this matter.⁵⁶

It is submitted that the "statement of acceptance" required of a personal representative under NDUPC Section 30.1-17-01 (3-601) may continue to be the oath presently in use.⁵⁷ It may be argued that the form of oath for civil officers generally required by North Dakota law should remain applicable to personal representatives in their capacity as a civil officer.⁵⁸ The requirement of the taking of this oath has been broadly applied to officials other than those specifically mentioned in the Constitutional provision, viz. "Members of the legislative assembly and judicial departments, except such inferior officers as may be by law exempted"⁵⁹ The continued use of the customary oath of civil officers as a qualifying act of a personal representative has an additional recommendation. That is, the continuation of such oaths as the "statement of acceptance" under the UPC will provide another point of continuity between the new and the old.

Letters Testamentary or of Administration continue to be the proof of appointment by the court of every personal representative.⁶⁰ No specific form of Letters is required by the NDUPC. Therefore, stocks of existing forms may continue to be used if they do not otherwise conflict with the tenor of the order appointing the personal

51. N.D. CENT. CODE § 30.1-17-01 (effective July 1, 1975), U.P.C. § 3-601.

52. N.D. CENT. CODE § 30-11-12 (1960).

53. N.D. CENT. CODE § 30-11-20 (1960).

54. N.D. CENT. CODE §§ 30.1-17-02 through 30.1-17-06 (effective July 1, 1975), U.P.C. §§ 3-602 through 3-606.

55. N.D. CENT. CODE § 30.1-17-02 (effective July 1, 1975), U.P.C. § 3-602.

56. Minutes, *supra* note 10; see also UNIFORM PROBATE CODE, *Official Text with Comments* § 3-603—Comment, West Publishing Co. (3d ed. 1971).

57. N.D. CENT. CODE § 30-11-04 (1960).

58. N.D. CONST. Article XVII, § 211 (1889); N.D. CENT. CODE § 44-01-05 (1960). *But see* UNIFORM PROBATE CODE, *Official Text with Comments* § 3-602—Comment, West Publishing Co. (3d ed. 1971).

59. N.D. CONST. Article XVII, § 211 (1889); *Menz v. Coyle*, 117 N.W.2d 290, 295 (N.D. 1962) attorneys at law; *State v. Cahill*, 49 N.D. 895, 193 N.W. 938 (1923) administrative officer.

60. N.D. CENT. CODE §§ 30.1-15-14, 30.1-12-03, 30.1-02-05 (effective July 1, 1975), U.P.C. §§ 3-414, 3-103, 1-305.

representative. The Association of Continuing Legal Education Administrators (ACLEA) has provided numerous forms⁶¹ for consideration by those states adopting the UPC, including specific forms for the issuance of Letters.⁶² The layout of such forms should be consistent with previously discussed style recommendations.⁶³

III. INVENTORY AND APPRAISEMENT

The Uniform Probate Code treatment of inventory and appraisal matters is a startling departure from the existing requirements of North Dakota law. In North Dakota the court appointment of appraisers and the subsequent return of an Inventory and Appraisal within 30 days of the appointment of the personal representative⁶⁴ has been considered almost jurisdictional to subsequent proceedings. In particular, the inventory and appraisal has been the foundation document not only for the estate tax return but for the final decree as well. The filing of an inventory and appraisal in the customary manner is permissible under the Uniform Probate Code. The obligation to file an inventory and appraisal of the estate can be otherwise discharged by the personal representative. It will be sufficient to mail a copy of the inventory and appraisal to interested persons who have requested it.⁶⁵ Such mailing of a copy of the inventory, or filing of the original thereof with the court, is required to be done within 3 months after the appointment of the personal representative.⁶⁶

Supplementary inventories of later discovered property may be prepared and filed with the court or mailed to interested parties in the same manner as an original inventory.⁶⁷ This is another example of the Uniform Probate Code's shift of emphasis from litigation to action.

IV. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this title, and as *expeditiously* and *efficiently* as is consistent with the best interests of the estate. (Emphasis added.)⁶⁸

—Wellman, UPC-Section 3-703

61. ACLEA, UNIFORM PROBATE CODE PRACTICE MANUAL, 285-477 (1972).

62. *Id.* at Forms 32, 34, 42, 43.

63. *See* text at 11.

64. N.D. CENT. CODE § 30-15-01 (1960).

65. N.D. CENT. CODE § 30.1-18-07 (effective July 1, 1975), U.P.C. § 3-707.

66. N.D. CENT. CODE § 30.1-18-06 (effective July 1, 1975), U.P.C. § 3-706.

67. N.D. CENT. CODE § 30.1-18-08 (effective July 1, 1975), U.P.C. § 3-708.

68. N.D. CENT. CODE § 30.1-18-03 (effective July 1, 1975), U.P.C. § 3-703 (emphasis added); *see also* N.D. CENT. CODE § 30.1-18-04 (effective July 1, 1975), U.P.C. § 3-704 which is to the same effect.

A surprise awaits the reader of the provisions governing the authority of the personal representative to take possession of the estate.⁶⁹ We have been taught that the legal title to real estate and tangible personal property is in the heirs or devisees, subject to the prerequisite possession thereof by the personal representative for the purposes of estate administration.⁷⁰

Many a devisee or heir who has waited for estate property to leisurely wend its way through probate administration would be surprised to learn that title to that property was theirs all along. Even the enjoyment of rents and profits of devised real estate is customarily withheld from the beneficiaries entitled thereto, until court approval of its distribution is obtained.

All of these fictions are swept aside in favor of the immediate possession of real estate and tangible personal property by the "*person presumptively entitled thereto*".⁷¹ However, the personal representative has an absolute right to possess such property upon his request that his possession is necessary for the purposes of administration.⁷² All the powers and duties of a personal representative are governed by the same standard of care and performance required of a trustee.⁷³ However, while a personal representative is subject to the *same standard* of care and performance as a trustee he does not therefore become a trustee.⁷⁴ He is liable personally, and upon his bond when required, for loss or damages to interested persons resulting from improper exercise of his powers or other breach of his fiduciary duties.⁷⁵

The rights of purchasers and others dealing with the personal representative are also governed by the NDUPC.⁷⁶ It is noted that: "Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 30.1-20-02 . . ."⁷⁷ a personal representative may perform almost any act with respect to estate property that a prudent decedent might have performed if living. The particular powers of the personal representative are enumerated⁷⁸ so as to eliminate unlisted powers under the doctrine of *ejusdem generis*.⁷⁹ However,

69. N.D. CENT. CODE § 30.1-18-09 (effective July 1, 1975), U.P.C. § 3-709.

70. N.D. CENT. CODE § 30-13-04 (1960).

71. N.D. CENT. CODE § 30.1-18-09 (effective July 1, 1975), U.P.C. § 3-709.

72. *Id.*

73. N.D. CENT. CODE §§ 30.1-18-11, 30.1-34-02 (effective July 1, 1975), U.P.C. §§ 3-711, 7-302.

74. N.D. CENT. CODE §§ 30.1-18-03, 30.1-34-02 (effective July 1, 1975), U.P.C. §§ 3-703, 7-302.

75. N.D. CENT. CODE § 30.1-18-12 (effective July 1, 1975), U.P.C. § 3-712.

76. N.D. CENT. CODE §§ 30.1-18-13, 30.1-18-14 (effective July 1, 1975), U.P.C. §§ 3-713, 3-714.

77. N.D. CENT. CODE § 30.1-18-15 (effective July 1, 1975), U.P.C. § 3-715.

78. *Id.*

79. *Gaustad v. Nygaard*, 64 N.D. 785, 256 N.W. 230 (1934).

a perusal of the twenty-seven subsections of specified powers⁸⁰ and a consideration of other related and implied powers exhaust the imaginations of your writers.

Well advised counsel are likely to review these particular powers in connection with the drafting of any will to determine which of those powers the testator might wish to withhold from a named personal representative. It is suggested that all existing wills be reviewed by testators for the same purpose.⁸¹

It may be argued that under the foregoing provisions every estate of a decedent could be treated and endured as a *de facto* trust, while a decedent's estate would endure only for such a term (beyond the time required to administer the estate) as was permitted by the interested parties. Estate tax settlement questions raised by the foregoing statement are discussed later in this paper.⁸²

V. CREDITORS' CLAIMS

Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

—NDUPC Section 30.1-18-11 (3-711)

The qualification of a personal representative obliges him to publish notice to creditors unless notice to creditors has previously been given.⁸³ A failure to publish the notice is a breach of fiduciary duty for which the personal representative may be held personally liable to distributees who were later damaged by having to pay unbarred claims after the estate had been closed.⁸⁴ An exception to this requirement is provided for small estates under summary administration where statutory exemptions, allowances, and necessary expenses of administration, last illness and funeral expenses exhaust the estate.⁸⁵ In effect, the turnip is not squeezed for naught.

In estates where the beneficiaries do nothing, the expiration of three years after the date of death of the decedent will bar claims for debts incurred by him during his lifetime, even though

80. N.D. CENT. CODE § 30.1-18-15 (effective July 1, 1975), U.P.C. § 3-715.

81. It is conceded that no provision of the NDUPC "shall be effective to invalidate any will executed prior to July 1, 1975, when that will would be valid under the laws of this state in effect at the time of its execution." N.D. CENT. CODE § 30.1-85-01 (effective July 1, 1975), U.P.C. § 8-101. However, this does not negate the effectiveness of the numerous other changes which will apply to wills executed before July 1, 1975, but admitted to probate after that date.

82. See Section VI, *infra*.

83. N.D. CENT. CODE § 30.1-19-01 (effective July 1, 1975), U.P.C. § 3-801.

84. N.D. CENT. CODE § 30.1-21-05 (effective July 1, 1975), U.P.C. § 3-1005; see also N.D. CENT. CODE §§ 30.1-18-03, 30.1-19-07, 30.1-19-08 (effective July 1, 1975), U.P.C. §§ 3-703, 3-807, 3-808.

85. N.D. CENT. CODE § 30.1-23-03 (effective July 1, 1975), U.P.C. § 3-1203.

no personal representative has been appointed and no notice to creditors has been given.⁸⁶ However, forty-five days after the death of the decedent, any creditor may apply for letters to protect his interests and those of other creditors.⁸⁷ Claims arising at or after the death of the decedent (except estate taxes)⁸⁸ are governed by particular provisions of the Code.⁸⁹ They provide for a four-month limitation on all claims whether contractual or otherwise. This limitation is new to probate procedure in this state.

Mortgagees, pledgees and lien holders against the real or personal property of the decedent's estate are not required to file claims against the estate in order to protect their property interest.⁹⁰ Under the same provision, and to the limits of insurance protection only, a tort claimant is not bound to file a claim within the time limits provided for general creditors of the decedent.⁹¹ The last exception extends the time during which an unliquidated tort claim may ripen after the date of death of the decedent. The practical limitation may thereby be considered to be six months after the issuance of letters to the personal representative, since that is the minimum time within which a personal representative must allow the estate to remain open. Thereafter, he may close the estate at will.⁹² Where publication of notice to creditors is made, creditors have four (4) months after the date of the first publication to present their claims.⁹³ This period is one month longer than is presently provided for in North Dakota, a seeming backward step which has been accepted by our legislature for the sake of uniformity and for no other reason.

A claimant has the following alternative means available for the timely presentment of claims against an estate:

1. He may deliver or mail the claim to the personal representative, or he may file it with the court. Presentment is complete upon the receipt of the claim by the personal representative, or the filing thereof with the court.⁹⁴ The right to present claims to the personal representative is new to North Dakota.

86. N.D. CENT. CODE § 30.1-19-03 (effective July 1, 1975), U.P.C. § 3-803.

87. N.D. CENT. CODE § 30.1-13-03 (effective July 1, 1975), U.P.C. § 3-203. Within this 45 day limitation a creditor may petition for the appointment of a family member or the named executor. Thereafter, the creditor may petition for his own appointment.

88. N.D. SESSION LAWS ch. 257, §§ 56 through 71 (1973) *amending* N.D. CENT. CODE ch. 57-37 (1960).

89. N.D. CENT. CODE ch. 30.1-19 (effective July 1, 1975), U.P.C. § 3-801 *et seq.*

90. N.D. CENT. CODE § 30.1-19-03(3) (a) (effective July 1, 1975), U.P.C. § 8-803(c) (1).

91. *Id.* at (3) (b).

92. N.D. CENT. CODE § 30.1-21-03 (effective July 1, 1975), U.P.C. § 3-1003.

93. N.D. CENT. CODE § 30.1-19-02 (effective July 1, 1975), U.P.C. § 3-802; *but see* Section 15 of HOUSE BILL 1040, N.D. SESSION LAWS ch. 257 (1973) *amending* N.D. CENT. CODE § 25-09-02.2 (1960). This amendment preserves the State's right to file claims for institutional care at any time prior to final distribution. This appears controlling over the conflicting provision as to such state claims in subsection 2 of N.D. CENT. CODE § 30.1-19-03 (effective July 1, 1975), U.P.C. § 3-803.

94. N.D. CENT. CODE § 30.1-19-04 (effective July 1, 1975), U.P.C. § 3-804.

2. A claimant has the alternative right to sue for his claim instead of presenting the same to the personal representative or filing it with the court.⁹⁵

The latter alternative is another departure from present North Dakota practice. The suit may be had against the personal representative in any court where the personal representative may be subjected to jurisdiction. The value of this provision is doubtful in North Dakota where the jurisdiction of civil cases is divided and often overlapping among various trial courts, depending upon the amount in controversy. It would be hoped that the simplicity of adjudication of claims in probate and the applicability of probate filing time limitations would encourage the filing of claims in probate courts in lieu of commencing proceedings in civil courts. The present statutes which provide for the completion of civil actions against a person who dies while the case is pending, without the requirement of presentation of a renewed claim against the estate, are echoed in the Uniform Probate Code.⁹⁶ Claims are classified in substantially the same manner as under present law. The classes now numbered "1" through "8"⁹⁷ have been consolidated and lettered "a" through "f".⁹⁸ An attempt here to further describe the distinctions between the old and new provisions would only invite indolence in scholarship and error in application.

Notice of allowance of claims may be effected by the personal representative's non-action for sixty days after the time for original presentation of the claims has expired.⁹⁹ He may also effectively disallow the claim by including a warning of the impending bar to the claim if not pursued within the time allowed.¹⁰⁰ This disallowance may be contested by:

1. the claimant filing a petition for allowance thereof in the court, or,
2. his commencement of an independent proceeding in a civil trial court, not later than sixty days after the mailing of the notice of disallowance or of partial allowance.

The court order allowing the claim in a proceeding, or a judgment for plaintiff-claimant in a civil proceeding, allows the claim for the amount thereof¹⁰¹ and effectively reverses the disallowance by the personal representative. Presumably, such judgments are appealable under the respective probate or civil appeal procedures.

95. *Id.* at (2).

96. UNIFORM PROBATE CODE, *Official Text with Comments*, § 3-804—Comment, West Publishing Co. (3d ed. 1971); N.D. CENT. CODE § 30-24-15 (1960).

97. N.D. CENT. CODE § 30-18-18 (1960).

98. N.D. CENT. CODE § 30.1-19-05 (effective July 1, 1975), U.P.C. § 3-805.

99. N.D. CENT. CODE § 30.1-19-06 (effective July 1, 1975), U.P.C. § 3-806.

100. *Id.*

101. *Id.* at (3).

tive may pay any claim deemed by him to be just, but he may Provisions for continuation of interest (at the legal or contract rate) of allowed claims substantially parallel current law governing civil judgments. In addition to those procedures a personal representative be personally liable to other claimants who may be injured by such informal payment.¹⁰² Except for liability for personal fault or breach of fiduciary capacity, a personal representative is not personally liable for the obligations of the estate.¹⁰³ Claims may be compromised by the personal representative,¹⁰⁴ as is presently allowed. It must be observed in concluding this discussion of claims procedure that there is considerably more in the Code on this subject than has been outlined here.

VI. ESTATE TAX

Only two statements need be made here concerning the assessment of North Dakota Estate Taxes and the apportionment of state and federal estate taxes among the beneficiaries of decedents' estates.

First, under sections 56 through 69 of H.B. 1040,¹⁰⁵ certain amendments were made to the North Dakota estate tax laws. These amendments will effect a transfer of responsibility for the assessment and collection of North Dakota Estate Taxes from the county court of each county to the office of the State Tax Commissioner. The rate of estate tax, exemptions and deductions are not changed by these amendments.

Second, the Uniform Estate Tax Apportionment Act, presently in effect in North Dakota¹⁰⁶ is substantially duplicated by the North Dakota Uniform Probate Code.¹⁰⁷

VII. BRINGING THE ESTATE TO A CLOSE

There are several means available to the personal representative to bring an estate to a close.

The simplest of these alternatives is to file a closing statement with the court.¹⁰⁸ This must not be done until six months have expired after the issuance of letters to him and after the first publication of Notice to Creditors.¹⁰⁹ He must also allege that he

102. N.D. CENT. CODE § 30.1-19-07 (effective July 1, 1975), U.P.C. § 3-807.

103. N.D. CENT. CODE § 30.1-19-08 (effective July 1, 1975), U.P.C. § 3-808.

104. N.D. CENT. CODE § 30.1-18-15 (effective July 1, 1975), U.P.C. § 3-715 at subsections 3 and 17; see N.D. CENT. CODE § 30-13-09 (1960) for present provisions.

105. N.D. SESSION LAWS ch. 257 (1973).

106. N.D. CENT. CODE ch. 30-21.1 (Supp. 1973).

107. N.D. CENT. CODE § 30.1-20-16 (effective July 1, 1975), U.P.C. § 3-916; see also UNIFORM PROBATE CODE, *Official Text with Comments*, § 3-916—Comment, West Publishing Co. (3d ed. 1971), where it states: "Section 3-916 copies the Uniform Estate Tax Apportionment Act."

108. N.D. CENT. CODE § 30.1-21-03 (effective July 1, 1975), U.P.C. § 3-1003.

109. *Id.*

has fully administered the estate of the decedent, has paid over the property thereof to the parties entitled thereto and has sent a copy of his final report and account to all interested persons of which he has knowledge. In the event that no proceedings are pending in the court (which involve the estate or the personal representative) one year after the filing of the closing statement, the personal representative's appointment terminates.¹¹⁰

Small estates may be closed at any time by the filing of a sworn statement of a personal representative that he has performed the duties described in the preceding paragraph.¹¹¹ The same one-year termination date applies in summary administration cases in the event that no proceeding in the estate is then pending.¹¹² Closing of an estate that has been fully supervised is accomplished in the conventional manner of filing a final report and account, having a hearing thereon, and the court's issuance of an order allowing such final report and account.¹¹³

Formal proceedings to terminate an unsupervised estate administration may also be had.¹¹⁴ The hearing on a petition therefor would be had upon notice to interested persons.¹¹⁵ The petition may request the approval of final account only or may also provide for the distribution of the estate as in intestacy or as provided by the will.¹¹⁶ Other cumulative or alternative relief may be prayed for and granted in such proceedings as provided by the section under consideration.

VIII. FINAL DISTRIBUTION AND DISCHARGE

A court ordered discharge of a personal representative is available upon completion of administration of formal estate proceedings.¹¹⁷ A similar discharge order of the court is available to personal representatives in fully supervised estates.¹¹⁸

CONCLUSION

'Before I pull my roots from the abyss my teacher,' I said, when I was standing, 'say a few words to relieve my confusion. Where is the ice?' . . . 'Here it is morning when over there it is evening. And Satan, whose hair was our ladder, is set in the ice as he was before.' . . . My guide and

110. *Id.* at (2).

111. N.D. CENT. CODE § 30.1-23-04 (effective July 1, 1975), U.P.C. § 3-1204.

112. *Id.*

113. N.D. CENT. CODE §§ 30.1-16-01, 30.1-16-05, 30.1-21-01 (effective July 1, 1975), U.P.C. §§ 3-501, 3-505, 3-1001.

114. N.D. CENT. CODE §§ 30.1-21-01, 30.1-21-02 (effective July 1, 1975), U.P.C. §§ 3-1001, 3-1002.

115. *Id.*

116. *Id.*

117. N.D. CENT. CODE §§ 30.1-21-01 *et seq.* (effective July 1, 1975), U.P.C. § 3-1001 *et seq.*

118. N.D. CENT. CODE §§ 30.1-16-05, 30.1-21-01 (effective July 1, 1975), U.P.C. §§ 3-505, 3-1001.

I took that dark path in order to return to the world of light,
and without thought of any rest we climbed, he first and I
second, until, through a round opening, I saw the beautiful
things that the sky holds; and we came out from there to
look again at the stars.

—Dante, *Inferno*
Canto 34, Lines 110-*finis*.

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APPENDIX "A"

Preliminary Parallel Table
North Dakota Century Code, Title 30, Probate Procedure
to
North Dakota Uniform Probate Code, Title 30.1, Ch. 257,
N.D. Session Laws 1973 (effective date July 1, 1975).

Caveat: This parallel table is a first attempt to correlate the particular provisions of the pre-existing probate procedure title of the North Dakota Century Code to the counterpart provisions of the North Dakota Uniform Probate Code. Every effort has been made to assure accuracy in this table. However, users are cautioned to remember that this table has been compiled in a necessarily imperfect attempt to introduce the provisions of the North Dakota Uniform Probate Code, through a comparison of its provisions with the familiar probate procedure of Title 30 of the North Dakota Century Code. Users are also cautioned to expect that some amendments may be made to Title 30.1 by the 44th Legislative Assembly which will likely take effect with the remainder of the Code on July 1, 1975.

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19-13	18-15(6)	21-06	04-04, 04-06	Uniform Estate Tax Apportionment Act	
19-14	13-04, 18-11	21-06.1	—	21.1-01	See 30.1-20-16 of
19-15	N/A; 18-15(6,23)	21-06.2	21-02		NDUPC. According
19-16	18-15	21-06.3	21-01(2)		to Comment (Pg.
19-17	18-15(23)	21-27	21-01, 21-08		172 of the Uniform
19-18	18-11	21-08	20-06(2), 21-01(2)		Probate Code—
19-19	18-15(17)	21-09	18-09, 18-15(18)		Official Text):
					“Section 3-916
					copies the Uni-

Title 30	Title 30.1	Title 30	Title 30.1	Title 30	Title 30.1
	form Estate Tax Apportionment Act."		Apportionment Act."		dianship Act now have two systems for protection of minors and mental incompetents, one which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. . . . Part 4 (Chapter 30.1-29 of the North Dakota Uniform Probate Code) would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.
21.1-02	See 30.1-20-16 of NDUPC. According to Comment (Pg. 172 of the Uniform Probate Code—Official Text): "Section 3-916 copies the Uniform Estate Tax Apportionment Act."	21.1-07	See 30.1-20-16 of NDUPC. According to Comment (Pg. 172 of the Uniform Probate Code—Official Text): "Section 3-916 copies the Uniform Estate Tax Apportionment Act."		
21.1-03	See 30.1-20-16 of NDUPC. According to Comment (Pg. 172 of the Uniform Probate Code—Official Text): "Section 3-916 copies the Uniform Estate Tax Apportionment Act."	21.1-08	See 30.1-20-16 of NDUPC. According to Comment (Pg. 172 of the Uniform Probate Code—Official Text): "Section 3-916 copies the Uniform Estate Tax Apportionment Act."		
21.1-04	See 30.1-20-16 of NDUPC. According to Comment (Pg. 172 of the Uniform Probate Code—Official Text): "Section 3-916 copies the Uniform Estate Tax Apportionment Act."	21.1-09	Omitted		
		21.1-10	Omitted		
			Establishment of Heirship		
		22-01	15-01(1), 12-01		
		22-02	15-02(2)		
		22-03	15-03		
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		22-06	15-03(1)		
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		22-09	—		
		22-10	15-09, See UPC Prac. Man. Form No. 40		
		22-11	15-12		
		22-12	02-05		
		22-13	15-03(2)		
			Veterans' Guardianship Chapter 23		
21.1-06	See 30.1-20-16 of NDUPC. According to Comment (Pg. 172 of the Uniform Probate Code—Official Text): "Section 3-916 copies the Uniform Estate Tax		According to General Comment to Article V. of the Uniform Probate Code at subsection (h) on page 201: "The many states which have adopted the Uniform Veterans Guar-		Action By and Against Executors and Administrators
				24-01	18-09
				24-02	18-03(3)
				24-03	18-09, 18-15(22)
				24-04	17-06(1)(d,e)
				24-05	18-10
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				24-07	18-11, 18-15(22)
				24-08	18-09
				24-09	19-08(3)
				24-10	19-08
				24-11	19-08(2)
				24-12	17-06
				24-13	21-05
				24-14	19-06
				24-15	19-03
				24-16	18-15(22)

Title 56	Title 30.1	Title 56	Title 30.1	Title 56	Title 30.1
05-33	—	06-04	20-02	06-13	09-03
05-34	—	06-05	18-15(6,23)	Uniform Testamentary Additions to Trusts Act	
05-35	04-10, 09-12	06-06	09-04		
Legacies and Devises		06-07	09-08	07-01	08-11
06-01	N/A	06-08	—	07-02	35-01(2)
06-02	20-02	06-09	—	07-03	N/A
06-03	—	06-10	—	07-04	N/A
		06-11	—		
		06-12	—		

NDCC Sections Repealed By The UPC
(In addition to Title 30)

N.D. Cent. Code	Title 30.1	N.D. Cent. Code	Title 30.1
6-03-66	31-01(1), 31-08, 31-09	56-04	See Title 56, <i>supra</i> , in this Parallel Table
7-04-07	31-01(1), 31-08, 31-09	56-05	See Title 56, <i>supra</i> , in this Parallel Table
25-04-13	25-04-13.1**	56-06	See Title 56, <i>supra</i> , in this Parallel Table
27-07-06	02-02, 26-02, 27-07-09**	56-07	See Title 56, <i>supra</i> , in this Parallel Table
27-07-07	27-07-09**, 02-02, 26-02	57-37-24(7)	56-37-24(6)**
27-07-10	See Chapter 44-11	59-02-06	34-02
27-07-38	02-02, 02-03	59-04-01	33-01, 33-02, 33-04, 33-06
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30-16-10	07-02	59-04-06	03-01
30-26-05	30-26-05.1	59-04-07	See UPC Prac. Man. Forms No. 9 through No. 11
32-16-44	29-24(3)(g)	59-04-09	—
35-03-12	09-09, 19-14	59-04-12	02-04 (See NDRCP— Rule 4)
38-10-04	18-15(9,10,23)	59-04-13	33-03
49-09-06	18-15(8), 29-24, 49-09-05(3)(i)**	59-04-14	34-04
56-01	See Title 56, <i>supra</i> , in this Parallel Table		
56-02	See Title 56, <i>supra</i> , in this Parallel Table		
56-03	See Title 56, <i>supra</i> , in this Parallel Table		

*Uniform Probate Code Practice Manual

Sections marked with the asteriks () indicate 1973 Amendments via H.B. No. 1040

